THE HON'BLE SRI BILAL NAZKI, THE ACTING CHIEF JUSTICE

And
THE HON'BLE SRI JUSTICE S.ANANDA REDDY

WRIT PETITION NOs :

7335 of 1992, 1585 & 11869 of 1995,

7219 & 9868 of 1998, 6860, 7580 & 22788 of 1999

% 05-08-2005

Between:

Quazi Mohd.Najmuddin Hussain and others ….Petitioners

And

State of A.P. rep. by its Secretary to the

Government, Revenue (Wakf) Department

and others ….Respondents

For the Petitioners : MR.MAHMOOD ALI
For the Respondents: GP FOR REVENUE

< Gist:

> Head Note:

? CITATIONS:

1. 1989 (2) ALT 524
2. AIR 1979 AP 116

3. (2003) 7 SCC 546

4. (2004) 6 SCC 254

5. (2004) 8 SCC 630

6. (2002) 8 SCC 715

7. 1998 (3) An.W.R.50

8. 1999 (2) ALD 570

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COMMON ORDER : (Per Hon'ble Sri Bilal Nazki, ACJ)

In writ petition No.22788 of 1999, appointment of 4th respondent as Kazi by the Government, has been challenged by the writ petitioner. When the case came up before a learned Single Judge of this Court on 03.02.2000 in connection with a vacate stay petition filed by the 4th respondent in the writ petition, the Court, while passing orders in W.V.M.P.No. 3389 of 1999, also made these observations;

> *"…… Besides these issues, in this writ petition some more questions of public importance can be addressed to. This Court prima facie believes that this Act could be a source of exploitation of the poor and innocent people of the State. Section 4 of the Act makes it abundantly clear that Kazi has no powers whatsoever neither judicial nor administrative. This section makes it also clear that any performance or religious ceremony of Muslims shall not be rendered illegal in the absence of a Kazi. Therefore, the question which hunts the Court is what is the necessity for appointing the*

Kazis. Along with this aspect, another aspect is also needed to be gone into. The next question would be with respect to mode of appointment. Should this power exclusively vest with the Government or should this power vest with somebody else because Section 2 of the Act itself is prima facie ambiguous which says that the Government shall appoint Kazis after consultation with prominent Mohammedans of the local area. But prominent Mohammedans are also not defined in this Section. As such there is vagueness even in Section 2 of the Act.

Let a copy of this order be sent to the learned Advocate General and Mr.V.Venkata Ramana, learned counsel who are requested to assist the Court as amicus curiae. Since this matter has some public importance, let this matter be placed before a Division Bench of this Court after obtaining orders from the Hon'ble the Chief Justice."

Thereafter, the case was listed before the Division Bench and at one stage, a notice was sent to the learned Attorney General of India also, as the Kazis Act, 1880 (for short 'the Act') was a Central Act.

In this batch of writ petitions, there are different questions raised in different petitions and the writ petitions would have to be decided individually, whereas the questions referred to in the reference would have to be decided by this judgment. Therefore, in this judgment, we will be confining ourselves to only those questions, which have been raised in the reference and those are the only questions, which were argued before us.

We have heard learned Counsel for the parties and also the learned Additional Solicitor General of India Mr.Mohan Parasaran.

The learned Single Judge, who referred the matter, expressed the view that whether there was necessity of appointing Kazis, as under the Act, it was not serving any purpose and Kazis appointed under the Act had no powers. The learned Additional Solicitor General appearing for the Union of India, submitted that the Act is almost a Century old Act and vires of this Act has not been challenged, therefore, this Court cannot go into its Constitutional validity. He

expressed that there was a historical background to this piece of legislation and was necessitated by the situation prevailing at the time of its promulgation. He submitted that after the end of the local Rule, when the British Crown took over the Rule of the country, the legal and Judicial system prevailing at that point of time was replaced by Court system, by the Crown. This created apprehensions in the minds of certain sections of the Society and in order to come to terms with such a situation, the Act was promulgated. He has drawn our attention to the 'Statement of Objects and Reasons' given in the Act. According to the learned Additional Solicitor General, office of the Kazi before the British Rule, was performing functions which were akin to the functions being performed by Civil Courts and even Magistrates, and with the establishment of Civil Courts and Magistracy, these offices of Kazis continued to perform the functions which were essentially religious although prior to that they were performing even secular functions. Realizing these problems, the Government made certain Legislations even prior to the Act. At one point of time, the Government felt that there remained nothing to be performed by Kazis except some ceremonial and religious functions and therefore there was no necessity for the Government to appoint these officers. Accordingly, in 1864, Act 11 of that year, all the Regulations relating to the appointment of Kazis by Government and duties to be discharged by them were repealed. This Act, however, added a provision, *"Nothing contained in this Act shall be construed so as to prevent a Kazi-ul-Kuzaat or other Kazi from performing, when required to do so, any duties or ceremonies prescribed by the Muhammadan law"*. After this Act was promulgated, it raised some difficulties, which were not anticipated at the time it was passed. Therefore, a Select Committee was appointed and the present Act was promulgated.

The facts narrated hereinabove are contained in the Statement of Objects and Reasons of the Act. It has also extracted an extract from the report of the Select Committee, which reads as under;

"It has been urged by some of the authorities consulted that

the Act should define the duties of the Kazis to be appointed under it, and should give them an exclusive right to perform those duties. Any attempt to do this would, we consider, be altogether outside the scope of the Bill as introduced and referred to us, and would, moreover, give a weight, which they have not at present, to the objections that have been taken to the Bill on the ground that it would practically force upon many persons the services of Kazis whom they did not care to employ.

We may add that in many places, owing to the way in which the Muhammadan population is split into sects, not always well defined, it would be almost impracticable to confer upon one or more persons a monopoly of the office.

We think it is clear that the Bill should be carefully confined to its original object, namely, that of providing a Kazi appointed by the Government for those who desire to avail themselves of the services of such a Kazi; and, as it has been suggested to us that a Kazi appointed under the Bill as originally framed might possibly be held to have an exclusive claim to perform the duties of a Kazi and to have a right to restrain others from performing those duties in the local area for which he was appointed we have added a clause to section 4 to make it clear that he will not.

The result of the Bill as it now stands will be that there will be a Kazi appointed by the Government for those who choose to avail themselves of his services, but that those who prefer to employ any other so called Kazi will be at liberty to do so."

The learned Additional Solicitor General says that whether the reasons which were available when the Act was promulgated are still valid or not, is a matter exclusively in the domain of the Legislature and as such this Court may not be in a position to declare the Act *ultra vires* or even unnecessary. This Act has, however, many difficulties in its application. It may also be pointed out that all Advocates appearing in the matter have supported the Act. Section 2 of the Act gives power to the Government to appoint Kazis for any local area. Section 2 of the Act prescribes that wherever it appears to the State Government that any considerable numbers of the Muslim residents in any local area desire that one or more Kazis should be appointed for such local area, the Government may, after consulting the principal Muhammadan residents of such local area, select a

person and appoint him as Kazi for that area. Power of appointment of a Kazi for a particular area is with the Government, but the question remains that this power has to be exercised after consulting the principal Muhammadan residents. There is no definition of 'principal Muhammadan resident' in the Act. Perhaps in 1880 when we were under a Monarchy, it was not difficult to find out principal Muhammadan resident, but after dawn of independence and Constitution, this Court fails to understand who would be the Muhammadan who could be called 'principal Muhammadan', who would be consulted by the Government before appointment of a Kazi. Similarly, under Section 4 of the Act, it is laid down that nothing in the Act would confer any Judicial or Administrative power to any Kazi. The presence of a Kazi or Naib Kazi is not necessary at the celebration of any marriage or the performance of any rite or ceremony. If Section 2 lays down a vague mode of appointment of Kazis, Section 4 makes it clear that they do not have any power, but at the same time, they are appointed by the Government and they have a stamp, and poor innocent and gullible people believe that these Kazis are as good as the Courts of Law. The learned Additional Solicitor General submitted that there is no impediment for the State Governments to issue guidelines in order to remove difficulties in the implementation of Section 2 of the Act. Similarly, in order to avoid any mischief being committed by any single individual appointed as Kazi, guidelines can be framed under Section 4 of the Act. The Act, in our view, does not serve any purpose. But according to the learned Counsels appearing for the parties, the striking down of the Act would create problems rather than solve them.

Mr.Mahmood Ali, appearing for one of the parties, submitted that for more than hundred years, Kazis appointed by the Government are performing marriages in the State of Andhra Pradesh. It has become a way of life although their presence is not necessary in order to perform a 'Nikah', but because this has become a way of life, therefore, certain methodology has also been evolved.

They scribe 'Nikhanama' at the time of 'Nikah' and a copy of such 'Nikhanama' remains with the Kazi and another copy is sent to the Wakf Board, where also it is preserved. Therefore, in case of any disputes regarding the factum of marriage, this evidence is readily available.

The learned Additional Solicitor General has relied on a judgment reported in *Citizens Welfare Organisation, Hyderabad & others v. Kazi Mohd.Abdul Haq & others.* In this judgment, a learned Single Judge of this Court was considering the question regarding the power of Government to appoint Kazis under the Act. In paras 3 and 5, the Court held;

> *"**3.** The controversy centres around the question of the power of the Government to appoint Khazis under the Act. Long over years the respondents 1 to 3 were appointed as hereditary Khazis. The contention of Sri K.Pratap Reddy, learned counsel for the petitioners is that, unless there is a request made by way of a representation by a considerable number of Mohammedans residing in any local area desiring to appoint one ore more Khazis, the Government is devoid of power to make such an appointment and that, therefore, the appointment of the respondents in this two writ petitions is without authority of law. The question, therefore, is what are the meanings of the words "considerable number of" and "local area". But be it as it may, instead of approaching any stricto-sensu lexographic consideration, the words "considerable number of Mohammedan residents" and "local area" are to be read in the larger perspective so as to subserve the purpose of the Act. Power to appoint Khazis is provided under Section 2 of the Act which reads thus:*
>
> > ***"2. Power to appoint Khazis for any local area :--** Wherever it appears to the State Government that any considerable number of the Muhammadans resident in any local area desire that one or more Khazis should be appointed for such local area, the State Government may, if it thinks fit, after consulting the principal Mohammadan residents of such local area, select one or more fit persons and appoint him or them to be Kazis for such local area.*
> >
> > *If any question arises whether any person has been rightly*

appointed Khazi under this Section, the decision thereof by the State Government shall be conclusive.

The State Government may, if it thinks fit, suspend or remove any Khazi appointed under this Section who is guilty of any misconduct in the execution of his office, or who is for a continuous period of six months absent from the local area for which he is appointed, or leaves such local area for the purpose of residing elsewhere, or is declared an insolvent, or desires to be discharged from the office, or who refuses or becomes in the opinion of the State Government unfit, or personally incapable to discharge the duties of the office."

*"**5.** It is made clear at this juncture that the very purpose of appointment of Khazi or appointment of Naib Khazis by Khazi is for a secular function i.e., to authenticate performance of marriage by issue of a marriage certificate prescribed under the executive instructions or any other law to the effect that he performed the marriage as per the personal law so that, in future, when a dispute arises as regards factum of celebration of marriage or regarding paternity of progeny born out of wedlock, there would be an authentic evidence of such marriage. A Khazi validly appointed by the State Government, in exercise of power under Section 2 of the Act, or, a Naib Khazi appointed by Khazi under Section 3 of the Act, obviously alone is entitled to maintain records of his/their performance of marriages in regular course of duties and functions and to keep the same as authenticated evidence for future purpose, or, to give a copy thereof after marriage to the parties as an evidence of marriage. Considered from this background, the question that emerges is, what is the meaning of the words "local area" ? It is needless to mention, as stated earlier, it is a generic word and imprecise. It may comprise of the entire city, town or village, or, it may be a part/parts thereof. If it is a part of the city, town or village, it is open to the State Government, as it is implicit from Sec.2 of the Act, to demarcate boundaries also to obviate overlapping of exercise of power, due to appointment of one or more Khazis to that local area/areas to that city, town or village, or any local areas thereof would be easily identifiable or to be localized. The still more difficult questions are the meanings of 'considerable number' and who are the 'prominent Mohammedan residents' of that the local area ? They are also imprecise and vague ones. The Parliament made Wakf Act (Act 29 of 1954), amended from the time to time to perform secular functions relating to administration of wakf properties endowed by Muslim philantrophists. Thereunder, Wakf Board and District Boards are constituted. It may be desirable, instead of leaving in lurch the area of controversy, it*

should be made more precise or specific incorporating in the Act to consult the Wakf Board or District Board so that any difficulty could be easily obviated, instead of leaving the vague terms to be imprecise."

He also relied on a judgment reported in *Khazi Mohd. Abbas Ali v. Andhra Pradesh Wakf Board & others.* In paras 19 and 20, the Court held;

*"**19.** The aforesaid extracts from the Statement of Objects and Reasons and the preamble to the Kazis Act, clearly show that a Kazi holds a position of considerable importance in Mohammedan community and that his presence at the celebration of marriages and at the performance of certain other rites and ceremonies, is considered essential by Mohammedans. Therefore the contention of Sri K.F.Baba, that a Kazi performs not only secular duties but also certain religious duties, has to be upheld.*

***20.** But the question for consideration is as to who is the authority competent to appoint a Kazi. Under S.2 of the Kazis Act, 1880, it is the State Government that has to appoint a Kazi after consulting the principal Muhammadan residents of such local areas. In the instant case, the State Government has not exercised the power to appoint a Kazi."*

We may add at this juncture that we have reservations about accepting what has been stated by the learned Single Judge in para 19 that the Kazi's presence is a must at the marriage ceremony and other religious ceremonies. According to us, marriage under Muslim Law is a contract, where the only requirement is that persons entering into the marriage should consent to such marriage in the presence of witnesses.

The learned Additional Solicitor General has also drawn our attention to a judgment reported in *Guruvayoor Devaswom Managing Committee & another v. C.K.Rajan & others*, particularly to paras 63 and 64, which read as under;

*"**63.** The High Court should not have proceeded simply to supplant, ignore or bypass the statute. The High Court has not shown any*

strong and cogent reasons for an Administrator to continue in an office even after expiry of his tenure. It appears from the orders dated 7-2-1993 that the High Court without cogent and sufficient reason allowed the Administrator to continue in office although his term was over and he was posted elsewhere. He also could not have been conferred powers wider than Section 17 of the Act. The High Court took over the power of appointment of the Commissioner bypassing the procedure set out in the Act by calling upon the Government to furnish the names of 5 IAS officers to the Court so that it could exercise the power of appointment of the Commissioner.

64. *The Court should be circumspect in entertaining such public interest litigation for another reason. There may be dispute amongst the devotees as to what practices should be followed by the temple authorities. There may be dispute as regards the rites and rituals to be performed in the temple or omission thereof. Any decision in favour of one sector of the people may hurt the sentiments of the other. The Courts normally, thus, at the first instance would not enter into such disputed arena, particularly, when by reason thereof the fundamental right of a group of devotees under Articles 25 and 26 may be infringed. Like any other wing of the State, the courts also while passing an order should ensure that the fundamental rights of a group of citizens under Articles 25 and 26 are not infringed. Such care and caution on the part of the High Court would be a welcome step."*

We do not think that the law laid down in this judgment would apply to the facts of the present case.

The learned Additional Solicitor General has also relied on another judgment reported in *Kusum Ingots & Alloys Ltd. V. Union of India & another*. In this case, in paras 18 and 19, the Supreme Court held;

*"**18.** The facts pleaded in the writ petition must have a nexus on the basis whereof a prayer can be granted. Those facts which have nothing to do with the prayer made therein cannot be said to give rise to a cause of action which would confer jurisdiction on the Court.*

19. *Passing of a legislation by itself in our opinion does not confer any such right to file a writ petition unless a cause of action arises therefor."*

According to the learned Additional Solicitor General, the vires of the Act has not been challenged, therefore, this Court cannot go into the vires of the Act, particularly when the Act is more than hundred years old.

He also relied on another judgment reported in *State of U.P. and another v. Satya Narain Kapoor (dead) by LRs. & others*. In para 14 of this judgment, the Supreme Court held;

> *"**14.** We find merit in the submission made by Shri Dwivedi, the learned Senior Counsel for the State. The private parties represented before us in several civil appeals have also found it difficult to support the impugned judgment. We are not doubting the jurisdiction of the High Court to take cognizance of an issue wherein the element of public interest is involved and to take up and entertain the same as public interest litigation and pronounce upon such issues exercising the jurisdiction which the Constitution does vest in the High Court but that has to be done by following the established rules of practice and procedure consistently with the rules of natural justice. The High Court, if convinced, should have framed specific issues with which it proposed to deal with in public interest and then should have put the State on specific notice inviting its pleadings and documents. Any other party likely to be adversely affected and interested in being heard may have been allowed the opportunity of doing so. A larger issue involving public interest and far-reaching implications should not have been dealt with so lightly, casually and hurriedly as the High Court has done. So far as the dispute raised by the private parties as writ petitioners in the High Court is concerned, the High Court could have postponed the decision in such individual writ petitions until the larger issue of public interest was decided; or else the High Court could have adjudicated upon the limited dispute as to the right of allotment over the two shops and then taken up the larger public interest issue for adjudication as a separate writ petition, the decision wherein would have become applicable even to Shops Nos. 195 and 196 as they being similarly situated as other shops, would have been liable to be treated equally."*

He has also referred to another judgment reported in *West*

Bengal Electricity Regulatory Commission v. CESC Ltd.. In paras 44 and 46 of the judgment the Supreme Court held;

> *"**44.** Having held on merits that the Regulations are not arbitrary and are in conformity with the provisions of the Act, we will now consider whether the High Court could have gone into this issue at all in an appeal filed by the respondent Company. First of all, we notice that the High Court has proceeded to declare the Regulations contrary to the Act in a proceeding which was initiated before it in its appellate power under Section 27 of the Act. The appellate power of the High Court in the instant case is derived from the 1998 Act. The Regulations framed by the Commission are under the authority of subordinate legislation conferred on the Commission in Section 58 of the 1998 Act. The Regulations so framed have been placed before the West Bengal Legislature, therefore they have become a part of the statute. That being so, in our opinion the High Court sitting as an appellate court under the 1998 Act could not have gone into the validity of the said Regulations in exercise of its appellate power."*
>
> *"**46.** ……. we hold that the High Court while exercising its statutory appellate power under Section 27 of the 1998 Act could not have gone into the validity of the Regulations which are part of the statute itself."*

Some of the parties have also referred to a judgment reported in *Qazi Mohammed Abdul Basith Qureshi v. The Government of A.P. & others*. This judgment only held that the post of Kazi was not hereditary, therefore, applications of all applicants were to be considered. Reference has also been made to a judgment reported in *Mir Khader Ali v. Qazi Mohd. Abdul Basith Qureshi & others.*

In the light of the arguments advanced at the Bar and the judgments relied upon, we restrain ourselves from going into the question of the legality of the Act, particularly as the matter is not under challenge before us. Rights of different parties under the Act are different issues in these writ petitions, which have to be gone into individually. But as we have pointed out hereinabove and we would like to reiterate that this Act neither gives any power to any Kazi appointed under it, nor grants any privilege to the Kazis appointed under the Act. This Act also does not close doors for Muslims to appoint anybody else, than

a Kazi appointed by the Government for performing the functions or ceremonies, which are performed by Kazis appointed under the Act. We also want to keep on record that Section 2 of the Act is vague and in the absence of a definition to the 'principal Mohammaden', the appointment of Kazis by the Government would also be a difficult task. However, these are matters, which Government may consider or this Court may have to consider in future in an appropriate case.

With these observations, we dispose of these matters as regards the reference. However, the individual claims in the individual writ petitions remain to be decided. The writ petitions may be listed before appropriate Benches.

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(BILAL NAZKI, ACJ)

5th August 2005.

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(S.ANANDA REDDY, J)

N.B:-

L.R. Copies to be marked.

(B/o)

ajr

N.B:-

Office shall place the copies of this order in each bundle, after the signatures of their Lordships.